

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TOMEKO MALONE,

Petitioner,

v.

ROSEANNE CAMPBELL, Warden,

Respondent.

Civil No. 08cv0159-IEG (CAB)

**ORDER (1) DENYING MOTION FOR
EXTENSION OF TIME (2) DENYING
MOTION SEEKING LEAVE OF
COURT TO AMEND NEWLY
PRESENTED CLAIMS AND TO
WITHDRAW CIVIL CASE NO.
06cv0169-DMS (RBB)**

Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner claims that his federal due process rights were violated when he was sentenced following his conviction for two counts of assault with a deadly weapon in San Diego Superior Court case number SCD171069. (Pet. at 1-2.) Specifically, Petitioner contends the trial judge failed to hold a hearing prior to sentencing in order to determine whether Petitioner could afford to pay the restitution fine imposed, and that he received ineffective assistance of counsel when his attorney failed to object to the imposition of the restitution fine and failed to challenge the restitution on direct appeal. (Pet. at 6-8.)

Petitioner is currently proceeding with a habeas action in this Court in which he challenges his conviction in San Diego Superior Court case number SCD171069. (See First Amended Petition filed 8/3/06 [Doc. No. 19] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS (RBB).) On December 14, 2007, the assigned Magistrate Judge issued a Report and Recommendation in that case which recommended that judgment be entered denying the First

1 Amended Petition on the merits of the claims presented. (See Report & Recommendation filed
2 12/14/07 [Doc. No. 33] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS (RBB).) Petitioner
3 filed Objections to the Report and Recommendation on January 24, 2008. (See Objections filed
4 1/24/08 [Doc. No. 37] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS (RBB).) A Reply to
5 Petitioner's Objections is due on or before February 14, 2008. (See Doc. No. 36 in SO. DIST. CA
6 CIVIL CASE NO. 06CV0169-DMS (RBB).)

7 On February 1, 2008, the Court dismissed the petition filed in this case because Petitioner
8 is currently proceeding with a challenge to his conviction in SO. DIST. CA CIVIL CASE NO.
9 06CV0169-DMS (RBB). (Doc No. 3.)


10 On February 26, 2008, Petitioner filed a Motion for Extension of Time to Amend the
11 Petition for Habeas Corpus and a Motion Seeking Leave to Amend Newly Presented Claims.
12 Essentially, Petitioner asks the Court to withdraw his petition in SO. DIST. CA CIVIL CASE NO.
13 06CV0169-DMS (RBB) and to grant leave to Petitioner to submit an entirely new petition in this
14 case, which would in turn become a consolidated action. (See Doc. No. 4, 7.)

15 Petitioner's motions are **DENIED**. Petitioner may not bring a second petition challenging
16 the same conviction previously challenged in an earlier petition barring necessary authorization
17 from the Court of Appeals.

18 Petitioner is permitted to file a motion to amend in SO. DIST. CA CIVIL CASE NO.
19 06CV0169-DMS (RBB).

20
21 **IT IS SO ORDERED.**

22
23 **DATED: March 7, 2008**

24 
25 **IRMA E. GONZALEZ** Chief Judge
26 **United States District Court**
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